IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 184 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SETTLEMENT COMMISSIONER AND DIRECTOR OF LAND RECORDS

Versus

K J DEVMURARI

Appearance:

MS MANISHA LAVKUMAR, AGP for Petitioner

MR PJ KANABAR for Respondent No. 1

NOTICE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 02/03/2001

ORAL JUDGEMENT

In this petition under Articles 226 and 227 of the Constitution, the Settlement Commissioner & Director of Land Records, Gujarat State at Ahmedabad has challenged the judgment and order dated 31.1.1991 passed

by the Gujarat Civil Services Tribunal in Appeal No. 275 of 1990 and the judgment and order dated 5.12.1991 passed by the same Tribunal in review application No. 18 of 1991.

2. The controversy between the parties is about the seniority of respondent No. 1 (the appellant before the Tribunal) KJ Devmurari in the cadre of Senior Clerks and Maintenance Surveyors in the Directorate of Land Records. In the hierarchy in the Directorate, the post of Gauchar Surveyor is the lowest one. The promotional post is Senior Clerk (in the then pay-scale of Rs.330-560) or Maintenance Surveyor (in the then pay-scale of Rs.380-560). Respondent No. 1 herein had challenged the seniority of NI Trivedi and DM Patel in the cadre of Senior Clerks/Maintenance Surveyors and joined them as respondent Nos. 2 and 3 respectively. It appears that respondent Nos. 2 and 3 remained absent before the Tribunal. The Tribunal partly allowed the appeal of the appellant and directed the Settlement Commissioner to pass an order promoting the appellant to the post of Senior Clerk and to assign him 30.11.1981 as the deemed date of such promotion. Directions were also issued to fix the salary of respondent No. 1 notionally on the aforesaid post. The Tribunal further directed the Settlement Commissioner to consider the case of respondent No. 1 herein for further promotion on the post on which Shri Trivedi-respondent No. 2 herein was promoted with further deemed date and pay fixation.

The Tribunal had proceeded on the footing that respondent No. 1 herein had passed the concerned departmental examination within the prescribed chances and on that basis the Tribunal delivered the judgment dated 31.1.1991 containing the aforesaid directions. Thereupon the Settlement Commissioner filed a review application stating that respondent No. 1 - Devmurari had passed the concerned departmental examination at the 6th attempt; that was well beyond the prescribed three chances within which respondent No. 1 was required to pass the examination to retain his seniority in the higher cadre. That review application came to be dismissed by the Tribunal. Hence, this petition challenging the aforesaid judgment and orders of the otion

passed the following interim order on 3.3.1993 :-

"In the facts and circumstances of the case, no

interim relief can be granted. Benefits accrued to the petitioner pursuant to the decision of the Gujarat Civil Services Tribunal would however be subject to the result of the petition."

3. Before narrating the contentions urged by the learned AGP on behalf of the Settlement Commissioner, it would be necessary to set out the relevant dates of appointment and promotion of the three concerned parties.

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SSD Deptt. LRQ Exam. as Sr. Clerk as Mainte- nance as Shires- tedar (330-560) Surv yor (425-700) (380 560)

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It is also necessary to set out the relevant rules being the Land Records Qualifying Examination Rules, 1970 (hereinafter referred as "the Rules" or "the LRQE Rules"). As provided therein, they apply to all the persons, inter alia, recruited in the subordinate service service in the Land Records Department. `Subordinate Land Record Service' is defined as including Clerks, Surveyors, Senior Clerks, Maintenance Surveyors, etc. Rule 3(1) reads as under :-

"3(1) All the persons belonging to the lower divisions of the subordinate Land Records Service who are eligible to appear in the Land Records Qualifying Examination under Rule 8 shall be required to pass the Examination within three chances during the period of three years after they become eligible.

The second proviso gives one more chance to the persons belonging to backward classes. Admittedly, none of the parties belong to any backward class. The other provisos are not relevant for the purposes of this controversy.

Rule 4, in so far as the same is relevant, reads as under :-

4(1) Where any person belonging to the lower division of the subordinate Land Records Service

fails to pass the Examination within the prescribed number of chances and during the prescribed period, he shall lose his seniority and till he passes the Examination under rule 5, he shall not be eligible for promotion to the higher post and confirmation therein.

(2) ... ...

(3) Where a person belonging to the lower division of the subordinate Land Records Services passes the Land Records Qualifying Examination within the prescribed chances during the prescribed period, he shall retain his original seniority even if a person junior to him has passed the said examination and promoted to the higher post earlier than he.

Rules 5, 6 and 7 reads as under :-

5(1) Where a person who had passed the Departmental Examination or who is exempted from passing the same is not available for promotion to the higher post a person whose chances to pass the examination are not exhausted under rule 3, may be promoted to officiate in the higher post subject to the condition that he shall be reverted on the availability of a person who has so passed the examination or on his failure to pass the examination within the prescribed chances during the prescribed period , whichever even occurs earlier.

(2) ... ...

6. Where a person belonging to the subordinate Land Records Service but not being a direct recruit has not passed the Land Records Qualifying Examination within the prescribed chances and during the prescribed period, shall also, if he so, desires, be allowed to appear at such examination held subsequently on payment of examination fee of rupees thirty and if he passes such examination he shall be eligible for promotion to the higher post but he shall not be entitled to claim seniority over those persons who have been promoted before he become eligible for the promotion on account of their having passed the Land Records Qualification Examination earlier than him notwithstanding that he was senior to the persons so promoted in the cadre

from which promotion was given.

7. These examination shall ordinarily be held by the Commission twice in a year in the months of April and October.

Rule 8(1) reads as under :-

8(1) In order to be eligible for appearing at the Land Records Qualifying Examination, the person belonging to subordinate Land Records Service must have completed 5 years continuous service and passed sub service Departmental Examination unless he has been exempted from passing that examination.

The other Rules contain the detailed procedures for submitting applications for appearing at the examination, declaration of results and syllabus.

4. At the hearing of this petition, Ms Manisha Lavkumar, learned AGP appearing for the Settlement Commissioner raised the following contentions :-

(i) The Tribunal erred in proceeding on the basis that respondent No. 1 had passed the examination within the prescribed chances when it was the specific case of the Settlement Commissioner before the Tribunal that respondent No. 1 had not passed the examination within the prescribed chances but had passed the examination after paying additional fee which is the requirement when the candidate is allowed to appear at the examination beyond the prescribed chances.

(ii) In any case, the Tribunal erred in not granting the review application when the facts were placed before the Tribunal in order to clear the discrepancy which had crepted into the Tribunal's judgment.

(iii) In view of the facts stated in the Tribunal's judgment itself regarding the seniority and dates of appointment/promotion of respondent No. 1 vis-a-vis. those of NI Trivedi and DM Patel, respondent Nos. 2 and 3, it was obvious that the Settlement Commissioner had correctly published the seniority list of the cadre of Senior

Clerks/Maintenance Surveyors and, therefore, the Tribunal erred in allowing the appeal and in directing the department to give deemed date of promotion to the appellant and to grant promotion to respondent No. 1 in the cadre of Senior Clerks/Maintenance Surveyors with deemed date of 20.11.1981.

5. On the other hand, MR PJ Kanabar, learned counsel appearing for respondent No. 1 has contested the petition and made the following submissions :-

(i) The Tribunal was justified in rejecting the application for review as the facts stated by respondent No. 1 in the appeal memo before the Tribunal were not controverted by the department in its parawise remarks.

(ii) Even otherwise, respondent No. 1 had passed the examination within three chances and, therefore, no interference with the order of the Tribunal was called for.

(iii) In any view of the matter, there is no statutory rule prescribing that passing of the LRQ Examination is a condition precedent for promotion to the cadre of Senior Clerks/Maintenance Surveyors.

6. The last submission made by Mr Kanabar on behalf of respondent No. 1 may be taken up first in order to clear the ground for deciding the major controversy between the parties as to within how many chances respondent No. 1 had passed the examination in question.

7. A perusal of the Rules quoted hereinabove leave no room for doubt that the aforesaid statutory rules require the Clerks, Surveyors, Senior Clerks, Maintenance Surveyors, etc. to pass the Land Records Qualifying examination within three chances during the period of three years after they have become eligible. To be eligible for appearing at the LRQ Examination, the aforesaid employees are required to have completed five years continuous service after passing Sub Service Departmental Examination. There is no dispute about the eligibility of any of the three persons including respondent No. 1 to appear at the LRQ Examination as they had already completed five years continuous service after passing the Sub Service Departmental Examination.

A combined reading of Rules 3(1), 4, 5 and 6

reveals that if qualified persons i.e. the persons who have not passed the LRQ Examination are not available, unqualified persons may be promoted to the higher posts; but once qualified persons became available, such unqualified persons shall have to make room for the qualified persons. That is the mandate of Rule 5(1). Rule 6 further provides that if a person fails to pass the examination within three chances, he may be allowed to appear at such examination subsequently on payment of examination fee of Rs. 30/- and upon passing the examination he shall be eligible for promotion to the higher post. Even otherwise, temporary or ad-hoc promotion may be given to an employee belonging to Subordinate Land Records Services such as Clerks even if he has not passed the LRQ Examination provided he has not exhausted the prescribed chances and provided qualified clerks (those who have passed such examination) are not available with a condition that upon availability of qualified Clerks, the unqualified clerk will have to be reverted to the original post. However, no such benefit can be granted to a person who has failed to pass the examination within the prescribed chances. In this view of the matter, though Mr Kanabar may be technically right in contending that the Rules do not prescribe passing the LRQ Examination as a condition precedent for promotion to the higher post, for all practical purposes if a person has not been promoted to the higher post before exhausting the prescribed chances, he cannot be considered to be eligible for promotion to the higher post even on ad-hoc basis after exhausting the prescribed chances. That leads us to the moot question whether respondent No. 1 had passed the LRQ Examination within the prescribed chances.

8. It is true that in the appeal memo, respondent No. 1 had contended that he had passed the LRQ Examination within three chances and in support of the said statement, respondent No. 1 had given the following details :-

First Trial October, 1979
Second Trial October, 1981
Third Trial April, 1982

Since respondent No. 1 passed the examination held in April, 1982, his contention before the Tribunal was that he had passed the examination within three chances i.e. the prescribed chances. As against that, the department had stated in their parawise remarks that it was not true that respondent No. 1 herein (the appellant before the Tribunal) had passed the examination

within the prescribed chances. It was in terms stated that respondent No. 1 herein had passed the examination conducted in April, 1982 at an additional chance after paying the fees. The proposal submitted by the department for sending respondent No. 1 at the said examination in April, 1982 was also produced before the Tribunal though that proposal does not find place in the pleadings of the parties before this Court. It is thus obvious that the contention of respondent No. 1 herein (the appellant before the Tribunal) that he had passed the examination within three chances was not merely not admitted by the department, but was specifically controverted with an assertion that respondent No. 1 herein (the appellant before the Tribunal) had passed the examination at an additional attempt. Inspite of such clear pleadings, the Tribunal observed at internal page 11 of its judgment as under :-

> "it is nobody's case that the appellant appeared in the examination on payment of examination fee of Rs.30/-. In case of the appellant the correct position is that he passed the examination within the prescribed trials as in his case specific clear order is passed by the Government that his non appearance in examination held in April, 1978 should not be considered a chance as the appellant could not appear in such examination on account of the reasons beyond his control. Therefore inescapable conclusion emerging from the above discussion is that in case of appellant it has got to be held that he passed the L.R.Q. Examination within prescribed trials."

It is not possible to appreciate as to how the Tribunal could have arrived at this conclusion. It was not that the department had conceded that the appellant before the Tribunal had passed the examination within the prescribed chances. In view of the categorical averment made by the department in its reply that the appellant's contention of having passed the examination within the prescribed chances was denied and it was specifically stated that the appellant had passed the examination at an additional chance after paying fees, the Tribunal ought to have atleast allowed the review application of the department and permitted the department to place the necessary facts on record to clear the doubt about the number of chances in which the appellant before the Tribunal had passed the examination, in order to see that ends of justice are not defeated. It has rightly been contended by Ms Manisha Lavkumar, learned AGP for the department that the dispute was not merely seniority of

respondent No. 1 vis-a-vis respondent Nos. 2 and 3. If the directions of the Tribunal were to be accepted, many other persons would be affected by the reallocation of seniority to respondent No. 1 in the seniority lists of many cadres and that would bring about an upheaval in the department.

9. The learned counsel for respondent No. 1 also placed reliance on the decision of this Court in Deputy Conservator of Forest vs. Shramji General Workers' Union, 2001 (1) GLH 24 in support of his contention that the Court should confine itself to the records produced before the Tribunal.

The decision was rendered in the facts and circumstances of that case. The decision does not lay down any general principle that this Court has no jurisdiction to permit leading of evidence in a petition under Article 227 of the Constitution. In the facts of the present case, as already stated above, it was a specific case of the department that respondent No. 1 (the appellant before the Tribunal) had not passed the examination within the prescribed chances and had passed the same beyond the prescribed chances and on payment of additional fee. The Court therefore considered it in the interests of justice to produce the necessary data about the date of examination etc. and directed the appellant accordingly by order dated 12.1.2001.

10. In order to see that the grievance of respondent No. 1 is considered in light of the correct and complete facts, the Court called upon the department to produce the necessary facts on the record of this petition to clear any doubt or confusion about the number of chances taken by respondent No. 1 to clear the examination. Pursuant thereto, affidavit has been filed alongwith the chart indicating the different dates when the LRQ Examinations were conducted after respondent No. 1 became eligible for appearing at the LRQ Examination, whether respondent No. 1 had appeared at the examination and whether respondent No. 1 passed the examination or not. The details are as under :-

Month & Year of Exam.	Whether applied	Whether appeared	Result Declared	Remarks
April 1978	Yes Seat No.83	No	-	Resp.No. 1 was granted exemp-

	tion on medical ground.		
October 1978 Yes Seat No. 65		Yes	Failed
April 1979	--	No	-
October 1980 Seat No. 164	Yes	Yes	Failed
April 1981	No	No	-
October 1981 Seat No. 467	Yes	Yes	Failed
April 1982 Seat No. 66	Yes	Yes	Passed

It is thus clear that respondent No. 1 passed the LRQ examination at the 6th attempt, even after ignoring April 1978 examination at which he was granted exemption on medical ground.

11. Mr Kanabar for respondent No. 1, however, submitted that the department has not been taking consistent stand and has referred to the letter dated 27.2.2001 (Annexure "A" to the reply affidavit dated 2.3.2001) to show that the department had shown only four attempts.

12. The aforesaid letter dated 27.2.2001, however, does not throw any light on the controversy as even as per the said letter the appellant had failed to appear at April 1979 which was treated to be second attempt and October 1979 as the third attempt. Even the said letter stated that October 1981 and October 1982 examinations were additional attempts. The chart at Annexure I (pg. 39 of the paper book) signed by the Superintendent, Land Records, Bhavnagar was made available to the learned counsel for respondent No. 1 at the hearing on 16.2.2001 and the same was thereafter produced with the affidavit dated 28.2.2001. In response thereto, respondent No. 1 herein has filed the affidavit dated 2.3.2001, but the facts disclosed in the chart and the affidavit dated 28.2.2001 are not disputed. The only dispute sought to be raised is whether respondent No. 1 can be said to have cleared the examination within the prescribed chances. In view of the aforesaid details about the

number of times the examination was held and the fact that respondent No. 1 cleared only that examination which was held in April, 1982, the Court has no doubt that respondent No. 1 had failed to pass the LRQ Examination within the prescribed chances. As per Rule 3(1), respondent No. 1 was required to pass the examination within three chances, but respondent No. 1 passed the examination at the sixth attempt. In this view of the matter, the factual foundation on which the appellant had set up the edifice of his case before the Tribunal was non-existent.

13. On the merits of the dispute, it is obvious that since NI Trivedi, although junior to respondent No. 1 in the cadre of Clerks, passed the LRQ examination held in November, 1980 and was promoted to the higher post of Senior Clerk on 30.11.1981. In view of the provisions of Rules 4 and 6, respondent No. 1 who failed to pass the examination within three chances and passed the examination beyond the prescribed chances could not have claimed seniority over NI Trivedi in the cadre of Senior Clerks/Maintenance Surveyors.

So also in case of Shri DM Patel, who was admittedly senior to respondent No. 1 in the cadre of Junior Clerks, although he passed the LRQ examination in November, 1984 and since respondent No. 1 was not promoted to the higher post of Senior Clerk/Maintenance Surveyor before November, 1984, respondent No. 1 could not have been permitted to steal a march over DM Patel because the Rules provide that if a person fails to pass the examination within the prescribed chances, he is permitted to appear at the examination by paying additional fees and he will lose his seniority qua only those persons who have not merely passed the examination earlier but have also been promoted earlier before the senior in the lower cadre passes the examination.

14. In view of the aforesaid factual background and the statutory Rules laying down the principles determining seniority, no injustice was done to respondent No. 1 in the matter of fixation of seniority in the cadre of Senior Clerks/Maintenance Surveyors vis-a-vis. NI Trivedi and DM Patel. The Tribunal, therefore, ought not to have allowed the appeal of respondent No. 1 herein.

15. Mr Kanabar for respondent No. 1, however, submitted that there were some other persons who were promoted as Maintenance Surveyors even without passing the LRQ examination. He sought to place reliance on page

55 of the paper book which appears to be written submissions produced by respondent No. 1 at the hearing of the appeal before the Tribunal on 18.12.1990. Names of 11 such persons are given. Admittedly, however, none of those persons was joined as a party to the appeal before the Tribunal, although the appeal was filed by respondent No. 1 herein. Their names were given for the first time before the Tribunal on the date of hearing. In this set of circumstances, naturally the Tribunal could not have been expected to deal with any such contention. For the same reason, this Court also would not permit respondent No. 1 to raise any such contention qua the persons who are not parties before the Court. If at all respondent No. 1 had any grievance qua the seniority of those parties, he ought to have joined them as parties to the appeal before the Tribunal.

16. The petition is accordingly allowed. The judgment and order dated 31.1.1991 passed by the Gujarat Civil Services Tribunal in Appeal No. 275 of 1990 and the judgment and order dated 5.12.1991 passed by the same Tribunal in review application No. 18 of 1991 are hereby quashed and set aside and the appeal filed by respondent No. 1 before the Tribunal is hereby dismissed.

17. If respondent No. 1 was given any benefit on the basis of the aforesaid judgment of the Tribunal, the date of promotion and seniority of respondent No. 1 in the cadre of Senior Clerks/Maintenance Surveyors and other higher cadres will be determined by ignoring the judgment of the Tribunal.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

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